IN THE

SUPREME COURT OF THE UNITED STATES

AUGUST TERM, 1982

NO. 82-5188

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SUPREME COURT, U.S.

McARTHUR BREEDLOVE,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

RESPONSE OF STATE OF FLORIDA
TO
PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

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TABLE OF CONTENTS

	PAGES
OPINIONS BELOW	1
JURISDICTION	1
PREFACE	2
STATEMENT OF THE CASE	2-4
REASONS WHY THE WRIT SHOULD NOT BE GRANTED	8-16
I	5-10
II	5-16
CERTIFICATE OF SERVICE	17

TABLE OF CITATIONS
CASES

Alford v. State, 307 So.2d 433 (Fla. 1975)	14
Breedlove v. State, 413 So.2d 1 (Fla. 1982)	1
Cooper v. State, 336 So.2d 1133 (Fla. 1976)	13, 14
Department of Mental Hygene of California v. Kirchner, 85 S.Ct. 871, 380 U.S. 194, 13 L.Ed.2d 753 (1965) on remand 400 P.2d 321, 62 C.2d 586, 43 Cal. Rptr. 329	5
Dixon v. Duffy, 72 S.Ct. 10, 342 U.S. 33, 96 L.Ed. 46 (1951)	6
Dixon v. State, 283 So.2d 1 (Fla. 1973)	14
Durley v. Mayo, 76 S.Ct. 806, 351 U.S. 277, 100 L.Ed. 1178 (1956), reh. den., 77 S.Ct. 22, 352 U.S. 859, 1 L.Ed.2d 69	6
Dutton v. Evans, 400 S.Ct. 74, 91 U.S. 210 (1970)	7
Gardner v. State, 313 So.2d 675 (Fla. 1975)	11, 13
Gorman v. Washington University, 62 S.Ct. 962, 316 U.S. 98, 86 L.Ed. 1300 (1942), reh. den., 62 S.Ct. 1272, 316 U.S. 711, 86 L.Ed. 177	5

TABLE OF CITATIONS
(Cases Continued)

	PAGES
Gregg v. Georgia, 96 S.Ct. 2909, 428 U.S. 153, 49 L.Ed. 2d 859 (1976)	11
Halliwell v. State, 323 So.2d 557 (Fla. 1975)	13
Lewis v. State, 398 So.2d 432 (Fla. 1981)	15
Lockett v. Ohio, 98 S.Ct. 2954 438 U.S. 586 (1978)	11, 13
Lynch v. New York, S.Ct.__, 293 U.S. 52, 79 L.Ed. 191 (1934)	6
Neary v. State, 384 So.2d 881 (Fla. 1980)	15
Parker v. Randolph, 99 S.Ct. 2132, 442 U.S. 62, 60 L.Ed. 713 (1979)	7, 8
People of State of New York ex. rel. Consolidated Water Co. of Utica v. Maltbie, 58 S.Ct. 506, 303 U.S. 158, 82 L.Ed. 724 (1938)	6
Proffitt v. Florida, 96 S.Ct. 2960, 428 U.S. 242, 49 L.Ed. 2d 913 (1976)	11
Republic Natural Gas Co. v. State of Oklahoma, 68 S.Ct. 972, 334 U.S. 62, 92, L.Ed. 1212 (1948)	5
Rice v. Sioux City Cemetary, 775 S.Ct. 614, 349 U.S. 70, 99 L.Ed. 897 (1955)	5
Ross v. Moffitt, 417 U.S. 600 (1974)	1
Songer v. State, 365 So.2d 696 (Fla. 1978)	13
Southwestern Bell Telephone Co. v. State of Oklahoma, 58 S.Ct. 528, 303 U.S. 206, 82 L.Ed. 751 (1938)	6
Spinkellink v. Wainwright, 578 F.2d 528 (5th Cir. 1978) cert. denied, 440 U.S. 976 (1979), reh. denied, 441 U.S. 937 (1979)	11 11

TABLE OF CITATIONS
(Cases Continued)

	PAGES
State v. Dixon, 283 So.2d 1 (Fla. 1973)	11
Tedder v. State, 322 So.2d 908 (Fla. 1975)	14-15
United States v. Postal, 589 F.2d 862 (5th Cir. 1979)	7
Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971)	12

OTHER AUTHORITIES

28 U.S.C. Section 1237(3)	1
Section 90.801, Florida Statutes (1977)	6
Section 921.141, Florida Statutes (1977)	11, 12, 13

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McARTHUR BREEDLOVE,

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STATE OF FLORIDA,

Respondent.

OPINIONS BELOW

On the 4th day of March, 1982, the Supreme Court of Florida recently affirmed Petitioner's judgment and sentence. Breedlove v. State, 413 So.2d 1 (Fla. 1982). Rehearing was denied on the 19th of May, 1982 (A. 46). The instant Petition followed.

JURISDICTION

The jurisdiction of this Court is sought to be invoked by Petitioner under 28 U.S.C. §1237(3). It is Respondent's position that the issues raised here are not such as should be reviewed by this Court. Review by Writ of Certiorari is a matter of sound judicial discretion, and will be granted only where there are special and important reasons therefore. See Rule 19, Rules of the Supreme Court of the United States; Ross v. Moffitt, 417 U.S. 600 (1974).

PREFACE

The Petitioner, appellant in the lower court, will be referred to in this response as defendant. Respondent, the appellee, will be referred to as the State. The symbol "A" will be used to designate the "Appendix" to the Petition. Relevant portions of the trial transcript have been omitted from the Appendix by Petitioner. References will be made there to and designated "Trial Transcript".

STATEMENT OF THE CASE

Petitioner was indicted for First Degree Murder; Attempted First Degree Murder; Burglary; Grand Theft and Petit Theft for offenses committed on November 6, 1978 (A. 55-58). The victim had been laying in bed sleeping with his girlfriend when Defendant burglarized the house and stabbed the victim with a butcher knife. The victim was thereby caused to both drown in his own blood and bled to death internally. (A. 147-148). The victim suffered considerable pain and did not die immediately. (A. 13). There were also five incised defensive wounds on the victim's hand (A. 148) and the victim's girlfriend suffered a slash requiring nine stiches. (Trial Transcript 737). A large slash tear was found in the pillow slip where the victim had been sleeping. (A. 50). Proof at trial was based in large part upon Defendant's full confession, the voluntariness of which is not currently challenged. (A. 59-65). Defendant stated that between the hours of 12:00 a.m. and 3:00 a.m. on Monday, the 6th of November, he broke into the victim's house. (A. 61). Defendant did not know the exact street address but knew it was located

between 16th Avenue and 14th Avenue about six to seven blocks from the Holy Family Church. (A. 61).

Defendant proceeded into the livingroom, picked up a lady's purse located on the couch and brought the purse in the backyard to dump its contents out on the yard. (A. 61-62). After removing some money, $12-15, and a block/square watch with rhinestones on its face, Defendant confessed he left the purse outside and went back into the house to look for more jewelry. (A. 62). Defendant stated he proceeded into the bedroom where the victim was sleeping and started going through a jewelry box (A. 63).

In Defendant's confession he claimed he made some noise, and the victim woke up grabbing Defendant by the shirt. Defendant confessed he then stabbed the victim with a 12 inch long, 1 1/2 inch wide kitchen knife, which he had previously picked up on the victim's table. (A. 63). After dropping the knife and as he was running out the door, Defendant picked up the victim's pants. He then remembered he had gone through the pockets already, so he dropped the pants in the hallway, and ran out the back door. (A. 64).

Defendant admitted he stole a ten speed blue bicycle from a house three doors down, went to the U-Totem and then home, parking the bicycle in his yard. (A. 64). Defendant also admitted that he threw his pants into a garbage bin and sold the watch to a junkie in Hallandale. (A. 65).

At trial a next door neighbor testified that she had seen someone riding a blue bicycle in a direction away from the victim's house after hearing screams eminating from the

victim's yard (Trial Transcript 592-593). The police later confiscated the bicycle at Defendant's home. The victim's girlfriend verified in court that a square watch with rhinestones on it was stolen from her purse the evening of the murder as was the $10-12 it contained. (Trial Transcript 734).

There were 29 photographs taken of the scene which corroborated most of Defendant's confession. (R. 93-121). The medical examiner however, testified that in his expert opinion the victim was slain while he was still lying in bed (in contrast to the Defendant's confession that the victim grabbed him and Defendant then swung back at him (Trial Transcript 753-783). This testimony tended to prove premeditation on Defendant's part which was, in fact, what the Florida Supreme Court found, "the State introduced sufficient evidence of premeditation" "including Defendant arming himself with a butcher knife before entering the bedroom and defensive wounds suffered by both victims."(A. 11).

The jury was given the standard jury instruction on heinous, atrocious and cruel behavior (A. 288) and returned an advisory verdict recommending the death penalty (A. 299-300). The court accepted the jury's verdict, finding three aggravating factors and no mitigating factors. The crime was found to be heinous, atrocious and cruel; committed by a Defendant who had previously been convicted of another capital felony involving the use or threat of violence to the person, to-wit, two counts of assault with intent to commit rape and one count of burglary, with the intent to commit rape; and, the crime was committed while the Defendant was engaged in the commission of a burglary (A. 47-54). Defendant was sentenced to death. (A. 47-54).

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED FOR REVIEW AS THE FLORIDA SUPREME COURT DECIDED THIS CASE ON OTHER THEN CONSTITUTIONAL GROUNDS, TO-WIT, THE FLORIDA SUPREME COURT FOUND THE TESTIMONY COMPLAINED OF TO BE NON-HEARSAY AND ANY PROSECUTORIAL ERROR IN COMMENTING ON THE TESTIMONY HARMLESS.

It is well settled that in order to invoke the jurisdiction of this Court a federal question must be presented which is "substantial" in nature, Rice v. Sioux City Cemetery, 755 S.Ct. 614, 349 U.S. 70, 99 L.Ed. 897 (1955).

The United States Supreme Court has historically been wary of assuming jurisdiction of a case from a State Court unless it is plain that a federal question is necessarily presented, and, the party seeking review affirmatively shows that the United States Supreme Court has jurisdiction. Department of Mental Hygiene of California v. Kirchner, 85 S.Ct. 871, 380 U.S. 194, 13 L.Ed.2d 753 (1965) on remand 400 P.2d 321, 62 C.2d 586, 43 Cal. Rptr. 329; Gorman v. Washington University, 62 S.Ct. 962, 316 U.S. 98, 86 L.Ed. 1300 (1942), reh. den. 62 S.Ct. 1272, 316 U.S. 711, 86 L.Ed. 1777. There is a policy against premature constitutional adjudications which demands that any doubts in maintaining the appellant's burden of establishing United States Supreme Court jurisdiction be resolved against jurisdiction, Republic Natural Gas Co. v. State of Oklahoma, 68 S.Ct. 972, 334 U.S. 62, 92 L.Ed. 1212 (1948).

Further, the United States Supreme Court has no jurisdiction to review a State Court decision unless it appears affirmatively from the record that the lower court's decision on the federal question presented was necessary to

the determination of the cause.' Where the court's decision might have been based on a state ground or on a federal and state ground the United States Supreme Court will not undertake to review it, Durley v. Mayo, 76 S.Ct. 806, 351 U.S. 277, 100 L.Ed. 1178 (1956), reh. den. 77 S.Ct. 22, 352 U.S. 859, 1 L.Ed.2d 69. See, also, Southwestern Bell Telephone Co. v. State of Oklahoma, 58 S.Ct. 528, 303 U.S. 206, 82 L.Ed. 751 (1938); People of State of New York ex rel. consolidated Water Co. of Utica v. Maltbie, 58 S.Ct. 506, 303 U.S. 158, 82 L.Ed. 724 (1938); Dixon v. Duffy, 72 S.Ct. 10, 342 U.S. 33, 96 L.Ed. 46 (1951); Lynch v. New York, __S. Ct.__, 293 U.S. 52, 79 L.Ed. 191 (1934).

In the instant case the Florida Supreme Court held that the statements, now argued as objectionable, were properly admitted into evidence as non-hearsay; thusly the court disposed of the constitutional issue on other than constitutional grounds:

> "The lower court properly admitted the detectives' testimony about what the Gibsons said because it came in to show the effect on Breedlove rather than for the truth of those comments. The informal statements, therefore, were not hearsay and could be admitted into evidence. The judge cautioned the jury on how to use this testimony."
>
> (A. 9).

Where a statement is admitted into evidence not for the truth of the words spoken but merely to prove that the words were in fact spoken no right to confront the out of court declarant arises.

The hearsay rule, §90.801, Florida Statutes (1977) does not prevent a witness from testifying as to what he has heard, rather it is a restriction on

the proof of the fact through extra judicial statements, Dutton v. Evans, 400 S.Ct. 74, 91 U.S. 210 (1970); U.S. v. Postal, 589 F.2d 862 (5th Cir. 1979). The confrontation Clause has never been held to bar the admission into evidence of

> "every relevant extrajudicial statement made by a nontestifying declarant simply because it in some way incriminates the defendant. See, e.g., id., at 80, 91 S.Ct., at 215; Mattox v. United States, 156 U.S. 237, 240-244, 15 S.Ct. 337, 39 L.Ed. 409 (1895)."
>
> Parker v. Randolph, 99 S.Ct. 2132, 442, U.S. 62, 60 L.Ed. 713 (1979).

Defendant did, however, have the right to confront Detective Ojeda, the declarant who related the statements to the court, and Defendant did in fact subject the witness to all the rigors of cross-examination. Defendant also had the right to call the out of court declarants, Defendant's mother and brother, to the stand as witnesses in an attempt to show that the statements were not made. However, Defendant chose not to. As such, all confrontation rights properly Defendant's were satisfied, see, Dutton v. Evans, 400 U.S. 74, 91 S.Ct. 210 (1970); United States v. Postal, 589 F.2d (5th Cir. 1979).

The court also properly instructed the jury that the statements were not being introduced for their truthfulness, but rather for what Detective Ojeda told the Defendant at the time of their conversation. The court instructed as follows:

"THE COURT: Members of the jury, counsel sometimes have a difference of opinion as to matters of evidence, and that, of course, is my responsibility to resolve.

I have admitted that evidence in this case, and you should understand that as to the officers' testimony about statements made to him by someone else, you are not to accept the statements that somebody else told the officer as the truth of that issue at all.

It is simply to give you the opportunity to evaluate for the purposes of your decision, what this officer may have told the defendant at the time their conversation took place.

It is not to go to the truth of what he told the defendant, just simply what he said. All right.

MR. STELZER: Just to make that clear, Your Honor is not instructing the jury that they are not to accept the officers' statement.

THE COURT: No, sir.

MR. ZENOBI: Objection.

THE COURT: I am not saying that. I am simply saying that they are not to take those statements that he alludes to from somebody else as being the truth.

They are simply statements made by the officer which may or may not have been brought to his attention by somebody else.

Go ahead."

(Emphasis supplied) (A. 97-98).

A crucial assumption underlying the trial by jury system is that:

> "Juries will follow the instructions given them by the trial judge. Were this not so, it would be pointless for a trial court to instruct a jury, and even more pointless for an appellate court to reverse a criminal conviction because the jury was improperly instructed..."
>
> Parker v. Randolph, 99 S.Ct. 2132, 442 U.S. 62 60 L.Ed. 713 (1979).

Clearly, no substantial federal question is presented to this court for review-in fact there is no constitutional issue presented at all.

Petitioner, however, argues that the questioned testimony was admitted as non-hearsay but used as hearsay, therefore violating Petitioner's right of confrontation. To support his argument Petitioner points to the prosecutor's opening argument to the jury (Petitioner's Petition, p. 11).

The Florida Supreme Court, however, again disposed of this argument on other than constitutional grounds. The court found the remarks to be improper but not harmful -- no worse than defense counsel's remarks concerning the same statements:

> "A mistrial should be declared for prejudicial error which will vitiate the trial's result. Perry v. State, 146 Fla. 137, 200 So. 525 (1941). If the alleged error does no substantial harm and causes no material prejudice, a mistrial should not be declared. Id. Improper remarks can be cured by ordering the jury to ignore them unless they are so objectionable that such instruction would be unavailing.
>
> The judge refused to renew his cautionary instruction regarding the use of testimony referring to the Gibsons' statements and included no such instruction in those given before the jury retired to deliberate. The questions, therefore, are whether the prosecutor's comments transformed the non-hearsay material into hearsay and whether those comments were so prejudicial that this Court cannot say beyond a reasonable doubt that they had no effect on the verdict. Chapman v. California, 386 U.S. 18 (1967).
>
> It appears that the prosecutor's remarks were improper. These remarks,

however, were no worse than, and possibly not as harmful as, defense counsel's remarks concerning the Gibsons' statements. On rebuttal defense counsel mentioned the stolen bicycle being found at the Gibsons' home. He went on to say that the bicycle

> could have been ridden by the other four adults in that house, and what about those people? What did they do? They pointed the finger at my client.
>
> Sure it is his mother and brother. I do not like mothers and brothers testifying like that against my client. They said, 'He did it. He is the one."
>
> Mr. Godwin would have you believe we can call people like that.

(Emphasis added). It appears that defense counsel admitted that those statements were true. Considering the totality of the circumstances, we find the prosecutor's statements not so prejudicial as to require a new trial.[8]" (Emphasis added).

---

[8] "In denying the motion for new trial the judge responded to defense's objection to the State's entire argument by saying: 'I think the context in which the argument was made was not prejudicial in nature.' "

(A. 9-10).

As such, the Florida Supreme Court never touched the Confrontation Clause issue and decided the argument on the basis of harmless error. Clearly no substantial federal question has been presented to this Court for review.

II

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED FOR REVIEW AS THE APPLICATION OF THE DEATH PENALTY TO DEFENDANT WAS CONSTITUTIONAL.

It is now firmly established that capital punishment is not per se violative of either the United States or Florida Constitutions, Gregg v. Georgia, 96 S.Ct. 2909, 428 U.S. 153, 49 L.Ed.2d 859 (1976); State v. Dixon, 283 So.2d 1 (Fla. 1973). There also is no doubt that Florida's death sentence statute, Section 921.141, Florida Statutes (1977), is valid and constitutional, Proffitt v. Florida, 96 S.Ct. 2960, 428 U.S. 242, 49 L.Ed.2d 913 (1976); Lockett v. Ohio, 98 S.Ct. 2954, 438 U.S. 586(1978); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978); State v. Dixon, 283 So.2d 1 (Fla. 1973); Songer v. State, 365 So.2d 696 (Fla. 1978).

Defendant is apparently arguing that the facts in his case are not sufficient to authorize the imposition of the death penalty. The trial court, however, found three (3) aggravating circumstances and no mitigating circumstances to be applicable under Section 921.141, Florida Statutes (1977). Not only did the court find (1) that the homicide was especially heinous, atrocious and cruel but also (2) that it was perpetrated during the commission of a burglary and (3) that Defendant had previously been convicted of a violent felony. (A. 47-54). In Gardner v. State, 313 So.2d 675 (Fla. 1975) the imposition of the death penalty was found to be justified by just one aggravating circumstance -- that the homicide was heinous, atrocious and cruel. Certainly a finding of three aggravating circumstances without mitigation, is more than adequate.

Further, Defendant, in effect, argues that the crime he committed was not severe enough to warrant the death penalty under state precedent, citing to Tedder, supra and Lewis, supra. Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979), reh. denied, 441 U.S. 937 (1979), precedent in this jurisdiction, has interpreted Proffitt, supra, as foreclosing such an argument.

The Fifth Circuit found that there is no longer any need to compare Defendant's case with all other Florida death penalty cases to determine if Defendant was equitably sentenced. The court reasoned that the "federal courts then would be compelled continuously to question every substantive decision of the Florida criminal justice system with regard the imposition of the death penalty..." Federal courts would then be thrust into the substantive decision rightfully reserved to the Florida State judiciary under Section 921.141. "Under the Constitution, as well as fundamental notions of federalism and comity, that is not the rule of the federal courts. Cf. Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971)"[1] at p. 606.

Defendant appears to further argue that there was error committed by the court in the sentencing hearing when the State was permitted to elicit testimony from the medical examiner as to the pain and suffering experienced by the victim prior to death and that this error resulted in the death penalty being applied to Defendant in an unconstitutional manner. (A. 130-149).

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[1] The United States Supreme Court has found that the Florida Supreme Court has undertaken responsibly to perform its function of death sentence review with a maximum of rationality and consistency," Proffit v. Florida, supra at 2969 (opinion of Stewart, Powell, and Stevens, JJ). Also in Proffitt, the United States Supreme Court noted that the Supreme Court of Florida has not hesitated to vacate a death sentence when it has determined that the sentence should not have been imposed. Indeed, the Florida Supreme Court has vacated eight of the 21 death sentences that it has reviewed to date Id at 2967 (opinion of Stewart, Powell and Stevens JJ).

During a sentencing hearing pursuant to Section 921. 141, Florida Statutes (1977), evidence may be presented as to any matter that the court deems relevant to the "nature of the crime and the character of the Defendant." Compare, Lockett v. Ohio, 98 S.Ct. 2954, _U.S._ (1978) and Songer v. State, 365 So.2d 696 (Fla. 1978). This would include any matters relating to aggravating circumstances.

Pain and suffering of the victim prior to death is clearly a consideration in determining whether the crime was heinous, atrocious and cruel. In fact, in Cooper v. State, 336 So.2d 1133 (Fla. 1976), the Florida Supreme Court stated that as the victim was "killed instantaneously and painlessly, without additional acts which make the killing 'heinous' within the statutorily announced 'aggravating' circumstances" the standard of an aggravating circumstance was not met. Id. at p. 1141.

And, in Halliwell v. State, 323 So.2d 557 (Fla. 1975), the Florida Supreme Court found that bodily mutiliation which occurred hours after death was irrelevant in determining whether the crime was especially heinous, atrocious and cruel. However, if the mutiliation had occurred prior to death or instantly thereafter it would have been relevant in fixing the death penalty, Id at p.561. There is no question that pain and suffering is the kind of misconduct contemplated by the Legislature as relevant to the determination of aggravating circumstances. See, Gardner v. State, 313 So.2d 675 (Fla. 1975); Halliwell, supra. As such no constitutional question is presented to this Court for review.

As to the jury requiring an additional instruction because the trial court erroneously admitted evidence on pain and suffering, this contention is unfounded. First, the evidence introduced was properly admitted (as discussed earlier), and secondly, in any event, the jury received a standard jury instruction identical to that required by Dixon v. State, 283 So.2d 1 (Fla. 1973). (A. 288). This instruction has repeatedly been found sufficient.

In Cooper v. State, 336 So.2d 1133 (Fla. 1976) the Florida Supreme Court found:

> "Of course a proper instruction defining the terms 'especially heinous, atrocious or cruel,' or any other listed circumstance, must be given. Here the trial judge read the jury the interpretation of that term which we gave in Dixon. No more was required."
>
> at p. 1140

And, in Alford v. State, 307 So.2d 433 (Fla. 1975), Dixon, supra. was again quoted with approval. The court stated, "Again, we feel that the meaning of such terms (heinous, atrocious and cruel) is a matter of common knowledge, so that an ordinary man would not have to guess at what was intended." Id., at p. 444. Clearly there could have been no confussion in the jurors minds as words of common knowledge were not only used but properly defined by the court in the jury charge. (A. 288). There can be no prejudice as Defendant claims and no constitutional question presented before this Court for review.

Further Defendant argues the Florida Supreme Court did not apply its own precedent in sentencing Defendant to death. In support of this proposition Defendant cites to Tedder v.

State, 322 So.2d 908 (Fla. 1975) and Lewis v. State, 398 So.2d 432 (Fla. 1981). Both cases are readily distinguishable from the case at bar. Tedder and Lewis involved personal arguments in which passion turned into murder -- Tedder was a domestic argument between husband and wife; Lewis was a dispute over money. One of the most important distinguishing characteristics of both cases is that the jury recommended life imprisonment but the judge overruled the jury and sentenced Defendant to death. (In the case at bar the jury recommended death.)

Under capital felony sentencing law a jury recommendation for life imprisonment is entitled to great weight and should not be overruled unless the death sentence is clearly appropriate, Tedder, supra; Lewis, supra; Neary v. State, 384 So.2d 881 (Fla. 1980). In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a death sentence should be so clear and convincing that virtually no reasonable person could differ, Tedder, supra. Clearly, to reverse a jurys' recommendation the facts must be overly convincing. These cases and the standards established therein are not applicable in the instant case. Again, Defendant has stated no special or important reason for this court to exercise jurisdiction.

Further, Defendant argues that the Florida Supreme Court improperly substituted a new rationale for applying subsection (5)(h), one which the trial court did not espouse, to-wit, the fact that the attack occurred while the victim lay asleep in his bed (Petitioner's Petition p. 16). This allegation is patently untrue as in trial Judge Fuller's written sentencing findings he found in part that:

"The murder was especially heinous, atrocious or cruel. The victim, Frank Budnick, was asleep in bed along with Carol Meoni when the defendant entered the bedroom with a large butcher knife. The evidence indicated that the defendant approached the bed and began stabbing and slashing with the knife at Frank Budnick. There was a large slash tear found in the pillow slip where the victim had been sleeping. Carol Meoni, who was sleeping next to the victim was stabbed in the face (Ms. Meoni survived the attack). Both the victim and Ms. Meoni sustained "defensive" wounds on their hands. The victim's right hand had five (5) distinct wounds." (Emphasis added).

(A. 50).

Clearly the Florida Supreme Courts rational was properly based on the trial court's findings. Cf. Spinkellink v. State, 313 So.2d 666 (Fla. 1975), cert. denied., 428 U.S. 911 (1976).

Defendant has cited no basis upon which this Court may exercise jurisdiction. Florida's death penalty statute was not applied to Defendant in an overbroad manner but was properly imposed within the parameters of Proffitt, supra.

Based upon the foregoing, Respondent submits that Petitioner has not presented this Court with a federal constitutional claim.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, CHARLES A. STAMPELOS, Counsel for Respondent, and a member of the Bar of the United States, hereby certify that on the 1st day of September, 1982, I served copies of the Respondent's Response of State of Florida to Petition for Writ of Certiorari on Elliot H. Scherker, Assistant Public Defender at 1351 N.W. 12th Street, Miami, Florida 33125, Counsel for Petitioner, by a duly addressed envelope with postage prepaid.

Charles A. Stampelos

CHARLES A. STAMPELOS
Assistant Attorney General

dw/

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